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INTEREST OF AMICUS CURIA

The Missouri Association of Trial Attorneys ("MATA") is a not-for-profit organization of Missouri attorneys who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for civil plaintiffs. The purpose of MATA is to support and promote the improvement of the civil justice system in the state of Missouri and to protect and defend the rights of the individual in the civil justice system.

ARGUMENT

I. RESPONDANT DID NOT ERR IN ORDERING THE DEPOSITION OF FORD EMPLOYEES AS ADOPTION OF A RIGID RULE PRECLUDING

DEPOSITION OF CORPORATE OFFICIALS IS CONTRARY TO THE TEXT OF THE MISSOURI RULES OF CIVIL PROCEDURE, AND IS UNNECESSARY AS THE MISSOURI RULES OF CIVIL PROCEDURE ADEQUATELY ADDRESS THIS ISSUE AS WRITTEN.

The instant case is simple on its face. Relator Ford Motor Company sought a protective order to avoid producing deponents in a product liability case. The matter was heard by Respondent, and in the exercise of her discretion, Respondent found the deponents had discoverable evidence, and should appear for deposition. Similar rulings are made by courts in Missouri every day. In this case, however, Ford's has petitioned this Court to change the rules, due to its failure to show good cause for the order sought. The issue before the Court therefore, is whether it should continue to apply the Missouri Rules of Civil Procedure as written, or adopt whole cloth a new standard proposed by Relator Ford Motor Company. Under the current standard as stated by this Court, the decision of the Respondent should not be overturned, absent a finding her order was:

> clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Anglin v. Missouri Pac. R.R. Co., 832 S.W.2d 298, 303 (Mo. banc 1992).

Given the extensive hearing, briefing, and facts submitted to the Court showing

relevant information is held by the parties sought to be deposed, Ford Motor Company has surrendered the field on this basis. Instead, Ford and Amicus Product Liability Advisory Council, Inc. ("PLAC") seek to have this Court adopt a standard without basis or need under the Missouri Rules of Civil Procedure. As the Missouri Rules are adequate as written, the Court should deny a wholesale shift in the equities of Missouri's legal process.

By their express terms, the Missouri Rules of Civil Procedure include the ability to take the deposition of a corporate party's officers, directors, or managing agents. Pursuant to Rule 56.01(b)(1) the scope of discovery is broad, and includes discovery of everything that is relevant to the subject matter of the pending suit. Rule 57.03 (a) provides that this broad scope of discovery requires a party to attend deposition by notice. Under the terms of Rule 61.01(f) a corporate party is deemed to include anyone who is an "officer, director, or managing agent of a party". Due to the clear wording of these sections of the Rules, Missouri courts have found a right to depose officers and executives of corporate parties. Please see e.g. *Weldon, Williams & Lick, Inc. v. L.B. Poultry Co*., 537 S.W.2d 868, 872 (Mo. App. 1976)(Finding right to depose officers of a corporation under current discovery procedures, within trial court's general overall supervisory power).

This is in keeping with the Federal Rules of Civil Procedure upon which Missouri's Rules are based. Please see e.g. *Less v. Taber Instrument Corp*., 53 F.R.D. 645, 646 (W.D. N.Y. 1971)(Right to depose chairman of corporation is granted by rules, and failure to appear for noticed deposition is sanctionable); *Anderson v. Air West, Inc.*, 542 F.2d 1090, 1092-93 (9th Cir. 1976)(Finding that plaintiff "had a right to depose [Howard] Hughes" in suit against Hughes owned companies under the Federal Rules); *8 Wright & Miller*, Fed. Prac. & Proc.,

Vol. 8, § 2107 (Notice of deposition is proper for corporate officer, managing agent, or director); *Advisory Committee's Note* to Rule 37(d), Fed. R. Civ. P., 48 F.R.D. at 542 (1970)(Failure of officer, managing agent or director of a corporate party to allow discovery is deemed violation by the corporation).

Relator is correct that the Missouri Rules provide limits upon this right of discovery, but under the Missouri Rules these limits are exercised by the trial court under the express terms of Rule 56.01(c). Missouri courts have consistently stated the standard of review upon the exercise of the discretion granted to the trial court is extremely deferential. Thus, prohibition should be granted only upon a showing by Relator that the discovery order entered by the trial court is such an unreasonable abuse of discretion as to constitute an act in excess of the court's jurisdiction. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. banc 1999).

Unable to meet this standard, however, Relator in the instant case now comes before the Court and seeks to have the express terms of the Missouri Rules amended in this prohibition hearing. In support of this change, both Relator and Amicus Product Liability Advisory Council ("PLAC"), Inc., trot out a veritable parade of horribles, arguing that failure of the Court to adopt the "apex" doctrine will lead to everything up to and including the end of the American economic system. Relator fails to explain, however, why no Missouri case has address this topic if the system currently in place is so flawed. If the system in place were as fundamentally deficient as Amicus PLAC argues, one would expect a continuous stream of prohibition motions being filed by defendants. Further, one would expect numerous decisions by both the appellate courts, and this Court. The truth, however, is

contrary. Despite the current Rules being in effect for over thirty years, Relator is unable to cite a single case under Missouri law indicating the abuses which it claims can only be forestalled by the "apex" doctrine.

Indeed, if decided opinions are used as a gage, it would seem that the adoption of the "apex" rule in Texas has resulted in more, not less litigation over this issue. Since the adoption of the "apex" rule, Texas appellate courts have been called upon to address this topic over ten times in only 6 years. Please see e.g. *Neuls v. Peeples*, 1995 WL 75908 (Tex. App.-San Antonio Dec. 27, 1995); *Frozen Food Express Industries, Inc. v. Goodwin*, 921 S.W.2d 547, 550 (Tex. App. Beaumont 1996); *AMR Corp. V. Enlow*, 926 S.W.2d 640, 643 (Tex. App. Fort Worth 1996); *Simon v. Bridewill*; 950 S.W.2d 439, 442 (Tex. App. Waco 1997); *In Re El Paso Health care System*, 969 S.W.2d 68, 73 (Tex. App. El Paso 1998); *In Re Columbia Rio Grande Healthcare*, L.P., 977 S.W.2d 433, 434 (Tex. App. Corpus Christi 1998); *In Re Alcatel USA, Inc*., 11 S.W.3d 173, 175 (Tex. 2000); *In Re Daisy Manufacturing Co., Inc*., 976 S.W.2d 327, 329 (Tex. App. Corpus Christi 1998), Reversed 17 S.W.3d 654 (Tex. 2000); *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App. Houston 2000); *Enercor Inc. v. Pennzoil Gas Marketing Co.*, 2001 WL 754773 (Tex. App. Houston July 5, 2001).

Rather than the current effective rule which allows the trial court to manage discovery within the bounds of discretion, Relator advocates a system which would require micro management by the appellate courts of this state. Any rule which would have as the end result a potential tenfold increase in workload for the appellate courts of Missouri is unwise. Relator offers a potential devastating "fix", for a problem which does not even afflict the

current procedure in place.

Further, the foreboding disaster argued by Relator and Amicus PLAC is premised upon a faulty first principal. Amicus PLAC makes the naked assertion that the discovery at issue is part of a trend by Missouri plaintiffs' attorneys to abuse discovery. Amazingly, the only case cited by PLAC in support of this blanket pronouncement is not from Missouri at all. Indeed, given the "disturbing trend" and history of sanctions and discovery violations of the instant Relator, Ford Motor Company, Ford's assertions that plaintiff should not receive discovery in this case should be viewed by the Court with significant scrutiny. Please see e.g. *Wiitala v. Ford Motor Co*., 2001 WL 1179610 (Mich. App. Oct. 15, 2001)(Upholding sanctions against Ford of $546,836.19 for willful discovery abuses); *Ammerman v. Ford Motor Co*., 705 N.E.2d 539, (Ind. App. 1999)(Citing Ford's history of concealing and destroying documents in Bronco II cases); *Babb v. Ford Motor Co*., 535 N.E.2d 676, 683-84 (Ohio App. 1987)(Finding Ford provided unreasonably evasive answers and resisted discovery); *Rozier v. Ford Motor Co*., 573 F.2d 1332, 1349 (5th Cir. 1978)(Plaintiff granted new trial due to Ford's false assertions in failing to produce discoverable information); *Buehler v. Whalen*, 374 N.E.2d 460, 467-68 (Ill. 1977)(Ford guilty of providing false answers under oath, in an attempt to hide "evidence damaging to its case".); *Parrett v. Ford*, 52 F.R.D. 120, 122 (W.D. Mo. 1969)(Obstructionist and false answers provided to discovery requests); *Traxler v. Ford*, 576 N.W.2d 398,402 (Mich. App. 1998)(Finding that trial court's conclusion Ford had committed fraud and lied in responses to discovery were not clearly erroneous, given Ford's conduct which "created the appearance that it was lying or intentionally concealing relevant information.").

Further, a review of the Appendix to PLAC's brief shows other of its members constitute a veritable rogues gallery of discovery abuses. Please see e.g. *Gutter v. E.I. Dupont De Nemours*, 124 F.Supp.2d 1291, 1299 (S.D. Fla. 2000)(Plaintiffs made sufficient case that Dupont had committed discovery fraud upon the court in prior litigation, and were furthered in this fraud by their attorneys, invalidating attorney client privilege on basis of crime/fraud exception); *In Re E.I. Dupont De Nemours Co. Benlate Litigation*, 99 F.3d 363, 369 (11th Cir. 1996)(Finding that Dupont and its counsel may have engaged in criminal acts in flouting discovery orders of trial court, and noting the court assumes the United States Attorney will investigate the matter more thoroughly); *Kawamata Farms, Inc. v. United Agri Products et al*., 948 P.2d 1055, 1097 (Hawaii 1997)(Finding Dupont guilty of discovery fraud upon the trial court, and affirming sanctions of $1,500,000.00); *Hayes v. Mazda Motor Corp., et al*, 2001 WL 33208121 (D. Md. August 7, 2001)(Awarding sanctions against Mazda for discovery conduct that "can only be characterized as obstructionist, deliberately ambiguous and plainly resistant."); *In Re Firestone Tire & Rubber Co*., 878 F.2d 1443, 1989 WL 49256 (Fed. Cir. Ohio Table Case)(Lawsuit between two PLAC members, Goodyear and Firestone, finding **both** parties guilty of obstructionism, and failure to properly respond to discovery); *Brown v. American Honda Motor Co*., 704 So.2d 1234, 1235 (La. App. 1997)(Affirming grant of new trial for plaintiff and sanctions against Honda of $25,271.96, on grounds Honda abused discovery process, and made misrepresentations to the Court through "half truths and glib evasions."); *Honda Motor Co. v. Salzman*, 751 P.2d 489, 491 (Ala. 1988)(Affirming grant of default judgment against Honda, for willful violations of discovery, as trial court had "never seen a party who has been so willing to violate court

orders, never in my entire career...."); *Klemka v. Bic Corp*., 1996 WL 103830 (E.D. Pa. March 11, 1996)(Sanctioning Bic for violating court order, through "bobbing and weaving as to the reasons why responses have not been given", evidencing Bic's "lack of good faith" in failing to comply with discovery rules).

With the refusal to provide required discovery evidenced by the misconduct of PLAC's members, including Ford, it is not surprising that Relator and Amicus PLAC seek to have this Court absolve them of the requirements owed by every other litigant under the Rules of Civil Procedure. Indeed, absent depositions of the corporate officers with relevant knowledge, a party might never learn what items are being improperly withheld. Please see e.g. *Honda Motor Co. v. Salzman* at 492 (Depositions of Japanese witnesses disclosed documents which were not produced). Given the history of Ford in concealing and destroying evidence in Bronco II litigation, this Court should not approve a new rule which would enhance the hiding or concealing of discoverable information.

II. RESPONDANT DID NOT ERR AS ADOPTION OF THE INFLEXIBLE APEX DEPOSITION DOCTRINE IS BOTH CONTRARY TO MISSOURI LAW WHICH PRECLUDES DISPARATE TREATMENT BETWEEN INDIVIDUALS AND CORPORATION, AND WOULD INEQUITABLY SHIFT THE BALANCE OF DISCOVERY AGAINST THE PLAINTIFF

A second fundamental deficiency with the new rule which relator proposes in this prohibition hearing is that the "apex" rule would shift the balance of discovery against individuals. As the Court in *Lewis v. Hubert*, 532 S.W.2d 860, 866 (Mo. App. 1975) stated, it is "fundamental to our system of jurisprudence that rich and poor stand alike in our courts

and that neither the wealth of the one or the poverty of the other shall be permitted to affect the administration of the law." This first principal of justice was declared by this Court as "the law is no respecter of persons and it matters not what is the financial status of the defendant, whether a pauper or a millionaire..." *Rytesky v. O'Brine*, 70 S.W.2d 538,540 (Mo. 1934).

The Missouri Rules of Civil Procedure are based upon the intent to "provide a party with access to anything relevant to the proceedings and subject matter of the case not protected by privilege." *State ex. rel. Danforth v. Riley*, 499 S.W.2d 40, 42 (Mo. App. 1973), In considering whether a party is entitled to discovery, the burden should not be placed on the party seeking discovery, as the evidence is held by the other party. That is why the burden is placed upon the party seeking to resist discovery. In refusing a protective order, a court should thus consider that:

> [i]f the good cause requirement could be thus met by an ex parte affidavit that the affiant had no relevant knowledge of the subject matter of the action the salutary purpose of Rule 26, providing for unlimited discovery would be easily and unjustifiably frustrated.

Parkhurst v. Kling, 266 F.Supp. 780, 781 (E.D. Pa. 1967).

The proposed "apex" rule would inequitably shift the burden of discovery, requiring a plaintiff to exhaust numerous depositions before being allowed to question the person who actually has the information or testimony sought. Not only would this require significant and costly expenditures by an injured party ill equipped to afford them, it would also significantly tilt the tables of justice. Under the rule proposed by Relator, Ford would be

entitled to the broad discovery allowed under the Missouri Rules, while at the same time being allowed to significantly limit its duties to provide discoverable information. Such a rule is fundamentally unjust. Please see e.g. *First National Bank of Cicero v. Reinhart Vertrieb's AG*, 116 F.R.D. 8, 9-10 (N.D. Ill. 1986)("[I]t would be unfair to require plaintiff to use a restricted discovery process while defendant takes full advantage of the liberal discovery provisions of the Federal Rules", ruling defendant had not shown anything that would "justify this inequity"); *In Re Honda American Motor Co.*, 168 F.R.D. 535, 539 (D. Md. 1996)(Refusing to restrict deposition of managing agents of defendant, holding it would be "patently unfair to constrain plaintiffs' ability to discover facts necessary to make their case" through limits on depositions of corporations managing agents, as the scope of plaintiffs discovery would be limited, while defendant enjoyed "free reign to discover all relevant facts" under the Rules of Procedure).

Indeed, even were plaintiffs able to make their way through the obstacle course erected by the "apex" doctrine, it would be at a cost of revealing trial strategy and intangible work product. Under the Rules of Procedure, a notice for deposition to a party is not required to specify the subject matter of the examination. Please see e.g. 8 *C. Wright & A. Miller*, Federal Practice and Procedure §2037. When Ford notices a plaintiff for deposition, they are not required to have a hearing before the Court, providing documents and an outline of what they intend to ask the plaintiff. Under the rule proposed by Relator, however, a plaintiff would first be required to in effect "learn up" the defense on what plaintiff considers important by numerous inquiries of lower level employees. This trial and error would allow the defendant to develop its response, effectively neutering the value of many executive

depositions, even were plaintiff able to show unique or superior knowledge by the executive. Relator would be rightfully upset if plaintiffs sought to preclude their depositions, and instead proposed to provide someone to discuss what the plaintiff might know about their injuries. However, this is the rule Relator now proposes for corporations. Missouri Rule of Civil Procedure 57.03(b)(4) and its Federal Rule counterpart, Rule 30(b)(6), were intended to supplement the right to depose a named official, not revoke this right. The Advisory Committee Notes to Rule 30(b)(6) of the Federal Rules make this quite clear by stating:

> This procedure *supplements* the *existing practice* whereby the *examining party designates* the corporate official to be deposed. Thus, if the examining party believes that certain officials, who have not testified pursuant to this subdivision have added information, he may depose them.

Hospital Corp. Of America v. Farrar, 733 S.W.2d 393, 395 (Tex. App. 1987), citing 48 F.R.D. at 514, emphasis in original. Accord *Horsewood v. Kids "R" US*, 1998 WL 526589 (D. Kan. August 13, 1998)(Party has a right to notice a specific officer, director or managing agent of a corporation, and corporation is responsible for producing its representative for deposition); *Atlantic Cape Fisheries v. Hartford Fire Insurance Co*., 509 F.2d 577, 579 (1975)(Affirming dismissal of claim for failure of president of corporation to appear for deposition, as corporation does not have ability to shield testimony by failure to designate under Rule 30(b)(6). Clear terms of Rule 37 authorize sanctions for failure of an officer, director or managing agent of a corporation to appear for deposition).

In *Hospital Corp. Of America*, the defendant argued that a corporate defendant should not be subject to having its president deposed, but should instead be allowed to designate

who it felt would be a proper witness. In rejecting this argument, the Court held the ability to designate a representative to testify pursuant to a designee notice "was *never* intended to limit a deposing party's ability to take the deposition of a corporate officer, nor was it intended to allow a corporation to play the corporate information shell game." *Id.* At 395, emphasis in original. Relator Ford is attempting to establish this exact "corporate information shell game" as the law of Missouri. Adopting the "apex" doctrine would thus be akin to state supported three card Monte in a litigation context.

Amicus PLAC argues the fact a corporate officer is put forward to try and limit damage to the corporation's image arising from serious injuries and deaths caused by its products should not require testimony under oath. This argument, however, is contrary to both common sense and the facts of the instant case. In regard to the Bronco II, punitive damages have been awarded against Ford in other cases, and affirmed upon appeal for the willful and wanton conduct of Ford in marketing a vehicle Ford **knew was defective.**

In *Ammerman* v. *Ford Motor Co.*, 705 N.E.2d 539 (Ind. App. 1999), the court affirmed a punitive award of $13.8 million against Ford for the "utter indifference or conscious disregard for the rights of others" which Ford showed in marketing the Bronco II. Specifically, the record showed that Ford quit real world testing of the Bronco II during its development, "because it was too dangerous for the engineers and test drivers." *Id.* At 547. Since that time, Ford has conducted a cover up of its knowledge about the dangers of the Bronco II, gathering together all of the potentially damaging documents in one place, with 53 of the 113 most important having mysteriously "disappeared". *Id.* At 547. In affirming the award of $13.8 million in punitive damages against Ford, the appellate court

noted its agreement with the trial court's finding that:

> [t]he Bronco II's which rolled of the assembly line are dangerous and defective. Ford's knowledge of the defect cannot be reasonably questioned. The continued push to production of this product after all the internal protestation to the contrary, **is the crassest form of corporate indifference to the safety of the ultimate user or consumer and constitutes gross negligence.**

Id. At 557, emphasis added.

To date, Ford has still never sent notice or warnings to its customers who bought Bronco II's of the extremely defective and dangerous nature of the vehicle. Ford has finally confessed it hid information from the federal government about Ford's testing which showed the vehicle would roll over at speeds of less than 30 miles per hour. *Ammerman* at 546, 548. Finally, despite having punitive damages affirmed against it in 1999 for knowingly selling a dangerous and defective vehicle, Ford has never recalled the Bronco II. Ford's corporate standards on what it considers unreasonably dangerous, set by the individuals who are sought to be deposed, is essential evidence for both liability and punitive damages.

Even if the Court were to give consideration to the "apex" doctrine, the issue of Ford's continuing motive and cover up is sufficient to trigger a duty to testify, and thus no abuse of discretion is possible. Please see e.g. *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987)(Requiring testimony of Ford Motor's President, Executive Vice President, and General Manager of Parts and Services, as when motive behind corporate decisions are at issue, the plaintiff is entitled to depose the corporate officials who approved or administered the plan, rejecting Ford's apex argument); *Rolscreen*

v. Pella Products of St. Louis, Inc., 145 F.R.D. 92, 97 (Requiring testimony of president of corporation as "individuals with greater authority may have the final word on why company undertakes certain actions, and the motives underlying those actions."); *How To Avoid, Control Or Limit Depositions of Top Executives*, 63 Defense Counsel Journal, (April, 1996)(Noting that even under "apex" rule, if reason behind a corporate action are at issue, the court may allow deposition of top executives); *Deposing Apex Officials In Florida*, 72 Florida Bar Journal 10, (December 1998)(If allegations include knowingly marketing a defective product, or concealing facts in recall, "any knowledge or participation by an apex official is of critical importance to the case and courts should permit such apex depositions to proceed.").

Ford should not be allowed to trumpet its message through its chosen mouthpieces, and then deny the accuracy of those statements to be tested under oath by the most effective means of obtaining the truth, cross examination. Ford made the conscious decision to open the curtain, and reveal the wizard. It should not now be allowed to retreat back into the woodwork, hiding its spokesmen behind the cloak of corporate size. As the Court in *Travelers Rental Co., Inc. V. Ford Motor Co*., 116 F.R.D. 140, 144 stated in ordering the President of Ford Motor Company to appear for deposition:

> [l]astly, the lack of knowledge claimed by these high executives may, in and of itself, be relevant evidence. It is not beyond the realm of possibility that a corporation, when engaging in potentially illegal activities, would act in such a way as to make it seem that top executives had no knowledge or very limited knowledge of the alleged illegal activities.

Amazingly, in a candid confession, one of the firms representing Relator Ford at the hearing before the Respondent and in this case admitted a key reason behind the attempt to preclude testimony of executives is that "high level corporate testimony cannot be undone easily if the answers do not square with the facts as they become better understood through subsequent discovery." *Effectively Defending High-Level Corporate Officials*, 30 Arizona Attorney 12, (July/August 2001)(Authored by Heidi M. Straudenmaier, Partner at Snell & Willmer). Any rule which has as its principal basis attempting to insulate a corporation from the effects of false testimony by its corporate executives should be rejected.

III. RESPONDANT PROPERLY REFUSED TO ADOPT THE APEX DOCTRINE AS IT IS A MINORITY RULE AND COURTS HAVE CONSISTENTLY DECLARED EXECUTIVES MAY BE DEPOSED DESPITE "KNOW NOTHING" AFFIDAVITS

Relator and Amicus PLAC's contentions regarding the universality of the "apex" rule is simply unsupported by decided opinions. Primarily, the only Court's which have adopted the rigid "apex" rule advocated by Ford are Texas and California. Relator is thus outnumbered 24 to 1 in terms of state courts which have **not** adopted the rule it proposes. Further, the federal cases cited by Relator and PLAC support the standard currently in place in Missouri, the abuse of discretion standard. The Federal Appeal decisions cited are nothing more than decisions finding the trial court did not abuse its discretion in managing discovery. Please see e.g. *Thomas v. International Business Machines*, 48 F.3d 478, 483 (10th Cir. 1995)(Affirming trial court's decisions on discovery); *Salter v. Upjohn Co*., 593 F.2d 649 (5th Cir. 1979)(Affirming trial court's discretionary ruling).

The "apex" doctrine is a clear minority rule. In *Kuwait Airways Corp. v. American Security Bank, N.A.*, 1987 WL 11994 (D. D.C. May 26, 1987) The Court ordered the deposition of the chairman and highest ranking official of Kuwait Airways to take place as noticed. The Court began by noting the burden was on the party seeking a protective order, and that it is extremely difficult to meet this burden when attempting to prohibit a deposition. *Id*. At 2. Kuwait Airways argued, however, that a "special rule" applied where noticing a high level executive is counted as a form of harassment. *Id*. At 3. In rejecting this argument, the Court held "in short, high ranking corporate executives are not automatically given special treatment which excuses them from being deposed." *Id*. At 4. Thus:

> there is no such special rule in the common law of this country. Research indicates that most courts reject the claims of high corporate officials who aver they are to unknowledgeable or busy to be deposed.

Id. At 3, citing cases.

In *Nalco Chemical Co. v. Hydro Technologies, Inc*., 149 F.R.D. 686, 695-96 (E.D. Wisc. 1993), the Court clearly rejected the contention that a plaintiff should be required to settle for low level employee testimony, finding if plaintiff felt the deposition of the president of the corporation would be helpful, "they should be entitled to take it.". Further, the Court held that while the president "may be a busy man", a heavy workload and international travel are not sufficient grounds to prohibit the deposition of a corporate official. *Id.* At 696. Rather than adopt an "apex" rule, courts consistently prefer to rule on these matters on a case by case basis, utilizing the discretion granted under the Rules of

Procedure. Thus, corporate officials have been denied special status in responding to discovery. Please see e.g. *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92, 96-98 (S.D. Iowa 1992)(Rejecting argument that producing president who was not a "major player" would be burdensome and oppressive, as to deny deposition based solely on corporate position "would be an abuse of discretion". The "mere incantation of Bevis' status as president and his claim of limited knowledge cannot be a basis for insulating Bevis from appropriate discovery."); *Spreadmark, Inc. v. Federated Dept. Stores, Inc.*, 176 F.R.D. 116, 118 (S.D.N.Y. 1997)(Rejecting "apex" argument, and holding fact that another witness may have information does not preclude deposition of chairman and CEO); *Taylor v. National Consumer Cooperative Bank*, 1996 WL 525322 (D. D.C. Sept. 10, 1996)(Finding it doubtful that apex doctrine argued by defendant is rule in federal court, and ordering deposition of corporate president and CEO); *Anderson v. Air West, Inc.*, 542 F.2d 1090, 1092-93 (9th Cir. 1976)(Affirming grant of default judgment against corporation for failure of Howard Hughes to appear for deposition); *Horsewood v. Kids "R" US*, 1998 WL 526589 (D. Kan. August 13, 1998)(Fact that corporate vice president is "too busy and that a deposition will disrupt his work carries little weight" as "most deponents are busy", and some inconvenience in discovery does not "suffice to establish good cause for issuance of a protective order."); *Fraser v. Twentieth Century Fox Film Corp.*, 22 F.R.D. 194, 196-97 (D. Neb. 1958)(Rejecting arguments that corporate officials were to busy with work to be deposed, and finding no requirement exists to exhaust alternative means of discovery before deposing executives); *Lougee v. Grinnell*, 582 A.2d 456, 460 (Conn. 1990)(requiring deposition of former CEO of tobacco company, as access to information from alternative sources does not

"exempt a prospective deponent from testifying".).

These courts are also quite clear that a mere claim of lack of knowledge is not sufficient to meet the required standard for a protective order. Thus, the "know nothing" affidavits Relator puts forward are wholly insufficient to preclude the noticed depositions. Please see e.g. *Parkhurst v. Kling*, 266 F.Supp. 780, 781 (E.D. Pa. 1967)(Good cause required for protective order cannot be met by ex parte affidavit, as this would frustrate orderly application of Rules of Procedure). Clearly, the defending attorney has no incentive to attempt to refresh the memory of the affiant. Further, acceptance of these "know nothing" affidavits would lead to artfully crafted denials of knowledge, which could not be subjected to cross examination to determine their actual worth. These, and other equally availing reasons, have led courts to outright reject the proposal that an ex parte affidavit drafted by a party's lawyer is sufficient to excuse deposition testimony. Please see e.g. *Overseas Exchange Corp. v. Inwood Motors, Inc*., 20 F.R.D. 228, 229 (S.D. N.Y. 1956)(Affidavit by officers of corporation of no knowledge "no reason why they should not be examined", as examining party is "entitled to explore these subjects and test the truth of the statements of complete lack of knowledge"); *Rolscreen Co. v. Pella Products of St. Louis Inc*., 145 F.R.D. 92, 97 (S.D. Iowa 1992)(Affidavit of no "first hand knowledge" insufficient to preclude deposition testimony of president of corporation, as second hand knowledge of corporate executive may be inquired into); *Ierardi v. Lorillard, Inc*., 1991 WL 158911 (E.D. Pa. August 13, 1991)(Rejecting argument of attorneys for defendant, Shook Hardy and Bacon, that claimed lack of knowledge insulates from deposition, and that other discovery should

be tried as "the deposition process provides a means to obtain more complete information and is, therefore, favored."); *Kuwait Airways Corp. v. American Security Bank, N.A.*, 1987 WL 11994 (D. D.C. May 26, 1987)("Overwhelming authority indicates that an alleged lack of knowledge is an insufficient ground to prohibit the taking of a deposition", citing cases); *Naftchi v. New York Univ. Medical Center*, 172 F.R.D. 130, 132-33 (S.D. N.Y. 1997)(Party seeking discovery entitled to test professed lack of knowledge by dean of medical school, as lack of knowledge and busy schedule not enough for protective order); *Taylor v. National Consumer Cooperative Bank*, 1996 WL 525322 (D. D.C. Sept. 10, 1996)(Plaintiff entitled to test professed ignorance of president and CEO of defendant); *Less v. Taber Inst. Corp*., 53 F.R.D. 645, 647 (W.D. N.Y. 1971)(Same); *A.I.A. Holdings, S.A. v. Lehman Brothers, Inc*., 2000 WL 1538003 (S.D. N.Y. Oct. 17, 2000)(Ordering chairman of Bear Stearns to appear for deposition within 20 days, as claimed lack of knowledge insufficient, and noting an order to vacate a notice of deposition "is generally regarded as both unusual and unfavorable").

CONCLUSION

Relator and Amicus PLAC's proposal to remove the discretionary power of experienced trial judges, and replace this discretion with an unworkable maze of technicalities is both unwise and without need. The Missouri Rules of Civil Procedure have worked admirably in the context which is before this Court. Despite the gloom and doom pronouncements of Relator and Amicus PLAC, Missouri has no reported cases dealing with the issue of harassment of corporate officials. Texas on the other hand, after the adoption of the "apex" rule, has been required to revisit this issue repeatedly. The Missouri Rules of

Civil Procedure should not be altered on the basis a corporation is afraid its executives might give harmful testimony, and certainly not when the proposed alteration would increase the burden of discovery for the parties, the trial court, and the appellate courts.

The "apex" rule is also poor public policy. It significantly slants the field against those injured by defective and dangerous products, on the basis a corporate executive should not be required to testify under oath about the dangers of the products they sells. While defendants would be entitled to the broad discovery provided by the Missouri Rules, plaintiffs would be hamstrung from the beginning. In effect, it is requiring David to contest with Goliath, with his sling arm tied behind his back.

For these reasons, and numerous others, the vast majority of courts have not adopted an "apex" rule. 48 of the 50 states have not stripped the trial court of its power to regulate discovery within the bounds of discretion. The federal courts have likewise refused to adopt special rules, relieving corporate parties of their express duties under the Federal Rules of Civil Procedure. These same courts have wisely refused to allow ex parte and artfully crafted affidavits to frustrate proper discovery.

Amicus Missouri Association of Trial Attorneys respectfully submits this Court should likewise refuse to adopt Relator's proposed "fix", on a system which is not broken.

CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(C)

The undersigned does hereby certify that this brief complies with Special Rule No. 1(b), and contains 7,257 words. The undersigned further certifies that a floppy disk containing the Missouri Association of Trial Attorneys *amicus curiae* brief was filed with this brief in compliance with Special Rule No. 1(f), and that the disk is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify, pursuant to Special Rule No. 1, that (1) a hard copy of the foregoing document in the form specified by Special Rule No. 1(a) and (2) a copy of the disk required by Special Rule No. 1(f), were sent via Federal Express, this the 3rd day of November, 2001, to the individuals below. The undersigned does hereby certify that the disk required by Special Rule No. 1(f) is virus free.

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IN THE SUPREME COURT OF MISSOURI

No. SC83933

STATE OF MISSOURI, ex rel. FORD MOTOR COMPANY,

Realtor,

v.

THE HONORABLE EDITH L. MESSINA,
Circuit Court of Jackson County, Missouri, at Kansas City,

Respondent.

ON PETITION FOR WRIT OF PROHIBITION FROM
THE CIRCUIT COURT OF JACKSON COUNTY

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